

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAR PALA RA ANAN aka  
MARVELLOUS A. GREENE, SR.

Plaintiff,

No. CIV S- 02-0493 DFL GGH P

vs.

D. KIMBRELL, et al.,

FINDINGS AND RECOMMENDATIONS

Defendants.

Introduction

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. The only remaining issue for trial is plaintiff's claim for money damages for a First Amendment violation by defendants Pliler and Bolin in rejecting and returning plaintiff's chess book which had been mailed to him in June of 2001.

In an amended pretrial order,<sup>1</sup> filed on November 8, 2005, which followed the parties' unsuccessful efforts to settle this matter, the court determined, inter alia, that further briefing was necessary on the issue of whether plaintiff is entitled to punitive damages. Amended Pretrial Order (APO), p. 2. Plaintiff was granted thirty days to file and serve a

<sup>1</sup> The original pretrial order was filed on July 21, 2005.

1 memorandum of points and authorities in support of his claim for punitive damages, after which  
2 defendants were granted twenty days to file an opposition. The matter, thereafter, was to be  
3 deemed submitted. The court cautioned that there would be no extension of time absent  
4 extraordinary circumstances, in light of the trial date, which at that time had been re-set for  
5 February 6, 2006. The trial in this matter has subsequently been re-set twice, with the jury trial  
6 now set before the Honorable David F. Levi in Courtroom 7 on May 15, 2006 at 9:00 a.m.<sup>2</sup>

7 Plaintiff filed a declaration on December 6, 2005, another on December 13, 2005,  
8 a memorandum of points and authorities on December 16, 2005, and another memorandum of  
9 points and authorities in support of his punitive damages claim on December 21, 2005.<sup>3</sup>  
10 Although plaintiff's two memoranda were filed beyond the deadline and no request for extension  
11 of time was sought by plaintiff (stating any cause, much less extraordinary cause), the court will  
12 deem the filings timely. Defendants filed their opposition to the memorandum in support of  
13 plaintiff's punitive damages claim timely. In fact, their opposition, on December 21, 2005,  
14 preceded the filing in the docket of plaintiff's later memorandum. Plaintiff's January 3, 2006<sup>4</sup>  
15 "opposition to defendants' opposition...." will be disregarded because the briefing schedule only  
16 called for one brief from plaintiff and an opposition by defendants.<sup>5</sup>

17 The legal standard for summary judgment has previously been set forth in this  
18 case and will not be reiterated here. See (Order) & Findings and Recommendations, filed on  
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20 <sup>2</sup> See Minute Orders, filed on January 4, 2006 and January 19, 2006, docket entry nos. 93  
21 and 96.

22 <sup>3</sup> Application of the mailbox rule indicates these filings were made on November 29,  
2005, December 8, 2005, December 13, 2005 and December 14, 2005, respectively.

23 <sup>4</sup> Per the mailbox rule, filed on December 29, 2005.

24 <sup>5</sup> In this inapposite January 3, 2006 filing, plaintiff asserts, inter alia, that he is willing to  
25 settle and voluntarily dismiss this case if he is allowed a chess set, an item no longer at issue  
26 herein. In any event, the parties have already been provided an appropriate opportunity to settle  
this matter before another magistrate judge. The briefing required by this court does not touch on  
any settlement negotiation in which the parties may wish to engage.

1 January 14, 2004, pp. 3-5, adopted by Order, filed on March 31, 2005. See also, Cool Fuel v.  
2 Connett, 685 F.2d 309, 311-312 (9th Cir. 1982) (court may sua sponte grant summary judgment  
3 to non-moving party if there is no genuine dispute with respect to a material fact essential to  
4 proof of movant's case, so long as party against whom summary judgment is rendered had "a full  
5 and fair opportunity to ventilate the issues involved in the motion.") In this case, the court  
6 sought further briefing sua sponte on the issue of punitive damages, as noted above, and the  
7 parties have been granted a full and fair opportunity to submit their arguments.

8 Plaintiff's Filings

9 Plaintiff's December 6, 2005 declaration is a rather astonishing document wherein  
10 plaintiff, under penalty of perjury, sets forth that in 2002, while housed in New Folsom State  
11 Prison (or CSP<sup>6</sup>-Sacramento), he "ran a covert chess match with 15 other prisoners." He goes on  
12 to state that the "buy in was \$740.00 in stamps or money order[sic] or canteen"; that "the purse  
13 was \$5,180.00." The rules of the game were "winner takes all; no points for second place." An  
14 inmate named Rex Chappel won, beating plaintiff out in five games with three wins, one loss,  
15 one draw. Plaintiff's declaration, filed on December 6, 2005.

16 The court is apparently meant to infer, because plaintiff makes no further  
17 explanation in this declaration, that plaintiff seeks to predicate his claim for punitive damages in  
18 this action on his failure to receive the chess book at issue because, presumably, defendants'  
19 actions concerning a chess book he did not receive resulted in his loss of several thousand dollars  
20 in stamps, canteen goods and/or money in a "covert," not to say illegal and wholly unauthorized,  
21 prison chess gambling tournament he arranged. Needless to say, plaintiff's showing does not  
22 militate for a finding by this court in his favor on a claim of punitive damages based on these  
23 facts.

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26 <sup>6</sup> California State Prison.

1 In his second declaration, plaintiff, inter alia,<sup>7</sup> represents that while he was housed  
 2 at High Desert State Prison he ran a chess tournament in Buildings 5 and 6. December 13, 2005  
 3 declaration, p. 5. He includes, as Exhibit A, hand drawn diagram which sets forth pairs of  
 4 inmates “5 block” and “6 block,” although no facility is identified thereon. Plaintiff appears to  
 5 be attempting to indicate that certain of the inmates make up the “final 4,” although no dates or  
 6 further information is provided (or properly authenticated). In Exhibit B to his declaration,  
 7 plaintiff submits his handwritten D-yard “Chess Tournament By-Laws.” He does not indicate  
 8 thereon where and when these “by-laws” applied, whether they were endorsed by prison officials,  
 9 or any other pertinent information. In his declaration, plaintiff appears to be connecting the  
 10 exhibits to a chess tournament he ran on unidentified dates at High Desert. In any case, plaintiff  
 11 does not make clear how this sanctioned or unsanctioned putative chess tournament supports in  
 12 any way his claim for punitive damages herein.

13 In his December 16, 2005 memorandum of points and authorities, plaintiff alleges  
 14 that defendant Bolin was the mail room supervisor who sent back plaintiff’s chess book<sup>8</sup> and that  
 15 defendant Piler was responsible for creating or endorsing a policy of “illegal acts,” as well as  
 16 “grossly negligent” in her supervisory duties. Plaintiff cites, inter alia, Smith v. Wade, 461  
 17 U.S. 30, 55, 103 S. Ct. 1625, 1639 n. 21 (1983), in support of his claim for punitive damages. In  
 18 that case, in footnote 21, the Supreme Court quoted Carlson v. Green, 446 U.S. 14, 100 S. Ct.

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 22 <sup>7</sup> Plaintiff also states that he has some missing legal papers and is not able to file the  
 23 interrogatory responses he intended to use at trial and intends to file a whole new set of exhibit  
 24 items as well as an exhibit from another case to show chess matches “orchestrated” at High  
 Desert State Prison. December 13, 2005 declaration, p. 2. Exhibits of the parties were set forth  
 in the amended pretrial order. Plaintiff will have to make an in limine motion before the trial  
 judge for admission of any alternate exhibits.

25 <sup>8</sup> Plaintiff continues to raises claims that have been dismissed in his references to a chess  
 26 set and also apparently seeks to revive claims against a defendant (Kimbrell) who is no longer a  
 defendant in this action.

1 1468 n. 9 (1980), noting that after Carey v. Phipus,<sup>9</sup> “punitive damages may be the only  
 2 significant remedy available in some § 1983 actions where constitutional rights are maliciously  
 3 violated but the victim cannot prove compensable injury.”

4 In his December 21, 2005 memorandum, plaintiff revisits the 2002 tournament he  
 5 claims to have orchestrated, stating for the first time explicitly that he would have won the  
 6 \$5,180.00 had he had chess book(s) he had ordered.<sup>10</sup> December 21, 2005 memorandum, p. 1.  
 7 He tempers this claim somewhat near the end of his brief, stating that had he had his chess books  
 8 and a larger chess set, he “could have at least [given] Rex Chappel better games, and at best [he]  
 9 would have won the chess tournament.” Id., p. 4. Plaintiff also cites, inter alia, the case of  
 10 Cannell v. Lightner, 143 F.3d 1210, 1213 & n. 3 (9th Cir. 1998) for the proposition that “the  
 11 deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any  
 12 physical injury he can show, or any mental or emotional injury he may have incurred.” The  
 13 court notes, however, that this statement was made in the context of finding inapplicable 42  
 14 U.S.C. 1997e(e)<sup>11</sup> to a First Amendment claim for which injunctive relief, not money damages,  
 15 could be available.

#### 16 Defendants’ Opposition

17 Defendants aver that plaintiff is alleging now that defendant Bolin, the mailroom  
 18 supervisor, returned his chess book personally and that defendant Pliler ““created a policy or  
 19 custom of allowing or encouraging the illegal acts,”” without pointing to any evidence in support  
 20 thereof. Opposition (Opp.), p. 2, citing plaintiff’s December 16, 2005 memorandum. Plaintiff

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 22 <sup>9</sup> In Carey v. Phipus, 435 U.S. 247, 257 n. 11, 98 S. Ct. 1042, 1049 n. 11 (1978), the  
 Supreme Court noted that punitive damages may be available “in a proper case under § 1983.”

23 <sup>10</sup> Plaintiff also mentions that his loss may have also been due in part to not having  
 24 received a bigger chess board; however, his claim with respect to the chess board is no longer at  
 issue herein.

25 <sup>11</sup> “No federal civil action may be brought by a prisoner confined in a jail, prison, or other  
 26 correctional facility, for mental or emotional injury suffered while in custody without a prior  
 showing of physical injury.”

also claims that defendant Pliler was negligent in supervising subordinates. Id. None of these claims support an award of punitive damages, according to defendants. Id.

Defendants also reference Smith v. Wade, supra. Opp., p. 2. The Supreme Court therein held that punitive damages may be assessed by a jury under 42 U.S.C. § 1983, “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” Smith v. Wade, at 56, 103 S. Ct. at 1640. Id.

As also observed by defendants, the Ninth Circuit has recently determined that conduct on the part of defendants that is oppressive can provide a basis for a punitive damages award. Opp., p. 2, citing Dang v. Cross, 422 F.3d 800, 806 (9th Cir. 2005). The current Ninth Circuit Model Civil Jury Instruction § 7.5, addressing the issue of punitive damages in federal civil references, *inter alia*, oppressive conduct.<sup>12</sup>

If you find for the plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are not to compensate the plaintiff, but to punish a defendant and to deter a defendant and others from committing similar acts in the future.

The plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that defendant’s conduct was malicious, oppressive or in reckless disregard of the plaintiff’s rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of the plaintiff’s rights if, under the circumstances, it reflects complete indifference

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<sup>12</sup> “If you find for the plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future. The plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. *You may award punitive damages only if you find that defendant’s conduct was malicious, or in reckless disregard of the plaintiff’s rights.* Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of the plaintiff’s rights if, under the circumstances, it reflects complete indifference to the plaintiff’s safety, rights, or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff’s rights under federal law. Model Civ. Jury Instr. 9th Cir. 7.5 (2004) (emphasis added).” Dang v. Cross, 422 F.3d at 807. This instruction was found to be an “incomplete” presentation of the law with regard to punitive damages. Id.

to the plaintiff's safety and rights, or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or omission is oppressive if the person who performs or fails to perform it injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of the plaintiff.

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Model Civ. Jury Instr. 9th Cir. 7.5 (2005), in relevant part.

Quoting this instruction, defendants maintain that plaintiff has failed to allege facts to support a punitive damages award, contending that plaintiff's amended complaint states that defendants did not provide a prompt written statement explaining why his chess book was rejected by the mail room and that returning the chess book was outside the specified criteria for rejection of incoming publications. Opp., p. 3. Defendants aver that the allegations center on the failure of defendants to provide timely reasons that his book was returned and do not even claim that defendants caused the book to be returned or that defendants' conduct was malicious, oppressive or in reckless disregard of plaintiff's rights.<sup>13</sup> Id. Defendants argue that plaintiff's allegations do not approach the standard set forth for a punitive damages award set forth in Smith v. Wade, supra. Id.

#### Discussion

Defendants are correct that within his amended complaint, plaintiff's allegations with regard to defendant Bolin are focused on that individual's alleged failure to provide plaintiff with notice of the rejection and return of plaintiff's chess book(s) in June of 2001. See Amended Complaint. As to defendant Pliler, plaintiff also complains of her failure to provide notice about the return of his chess book. Implicitly at least, plaintiff also contends that his First Amendment

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<sup>13</sup> Defendants go on to contend that because plaintiff was credited with the cost of the chess book (by the U.S. Chess Federation), he cannot even show actual injury to support an award of compensatory damages. However, the court does not reach this question of whether plaintiff may, if successful, be entitled only to nominal damages; the parties were only asked to brief the question of plaintiff's entitlement to punitive damages.

1 rights were also violated by the defendants' failure to implement constitutional mail room  
2 policies. See Order & Findings and Recommendations, p. 5, filed on January 14, 2005, adopted  
3 by Order filed on March 31, 2005.

4 Plaintiff has not produced adequate evidence to support a claim for punitive  
5 damages. Although defendants do not refer to it, plaintiff's claim of injury in the form of a lost  
6 opportunity to fully compete for and win a self-described illicit "covert" chess match is patently  
7 absurd at best. It remains to be seen if plaintiff can prevail before a jury on his claims of a  
8 violation of his First Amendment rights against the defendants. Should he do so, however, this  
9 court finds that he has set forth wholly insufficient claims to support an award for punitive  
10 damages. Assuming that plaintiff is able to prove on these facts a violation of his constitutional  
11 rights, he does not state a claim as a matter of law with respect to entitlement to punitive  
12 damages.

13 In Larez v. City of Los Angeles, 946 F.2d 630, 639 (9th Cir. 1991), the Ninth  
14 Circuit found that punitive damages could be awarded where defendant police officers in a civil  
15 rights trial were found to have used excessive force in conducting a search. The defendants'  
16 argument on appeal that due process was violated because the punitive damages award was  
17 imposed on a lesser standard than actual malice was not considered because defendants had not  
18 objected to the punitive damages instruction in the trial court. Larez, supra, 946 F.2d at 639.  
19 Nevertheless, on the merits, citing Smith v. Wade, 461 U.S. at 56, 103 S. Ct. at 1640, the court  
20 indicated that defendants were mistaken because actual intent or malice is not required, so long  
21 as the conduct at issue involves "reckless or callous indifference to the federally protected rights  
22 of others.'" Also, as noted, in the Ninth Circuit case cited by defendants, it was found that a jury  
23 instruction which allows for punitive damages to be imposed for conduct that is oppressive and  
24 which caused plaintiff's injury was fully adequate. Dang v. Cross, 422 F.3d at 808.

25 Notwithstanding that the standard for fixing damages for the violation of a  
26 federally protected right remains a rather amorphous one, it surely requires, to justify seeking



1 punitive damages, a showing of recklessness or callous indifference far beyond that which  
2 plaintiff has alleged. To find otherwise would signify that the finding of any violation of a  
3 constitutional right in a § 1983 action could warrant an award of punitive damages.

4           Based on the evidence, or lack thereof, that plaintiff has presented herein, he has a  
5 hurdle to show any injury herein; however, should he prevail on his claims before a jury, he  
6 should be precluded from seeking punitive damages. No reasonable juror could fix an award of  
7 punitive damages if presented with these allegations, even if a jury finds the allegations proven as  
8 fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986)  
9 (defendant entitled to summary judgment if the evidence on which a jury could reasonably rely is  
10 insufficient to find for plaintiff). The parties having been granted a full and fair opportunity to  
11 submit their arguments, the court sua sponte will recommend summary judgment be entered for  
12 defendants with respect to plaintiff's claim for punitive damages and that this matter proceed to  
13 trial against defendants only on plaintiff's claim for compensatory and/or nominal damages.  
14 Cool Fuel v. Connett, 685 F.2d at 311-312 (9th Cir. 1982).

15           Accordingly, IT IS HEREBY RECOMMENDED that summary judgment be  
16 entered for defendants on plaintiff's claim for punitive damages and this case proceed to trial  
17 against defendants only on plaintiff's claim for compensatory and/or nominal damages.

18           These findings and recommendations are submitted to the United States District  
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
20 days after being served with these findings and recommendations, any party may file written  
21 objections with the court and serve a copy on all parties. Such a document should be captioned  
22 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
23 shall be served and filed within ten days after service of the objections. The parties are advised

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1 that failure to file objections within the specified time may waive the right to appeal the District  
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: 3/6/06

4 /s/ Gregory G. Hollows

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6 GREGORY G. HOLLOWS  
7 UNITED STATES MAGISTRATE JUDGE

7 GGH:009  
8 rana0493.fr